



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA**

**Criminal Appeal 27 of 2005**

**BERNARD ONGOMA MUKABANA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

The Appellant, Bernard Ongoma Mukabana, was convicted on 18.2.2005 by the Resident Magistrate at Butere, B. O. Ochieng Esq., in Butere SRM Cr. Case No. 813 of 2004 of the offence of handling stolen goods contrary to section 322(2) of the Penal Code, Cap 63, and was sentenced to five years imprisonment and hard labour.

The particulars of the alternative charge of handling were that the Appellant;

***“On the 3<sup>rd</sup> day of October 2004 at Ebati village, Shirembe Sub-Location in Butere/Mumias District within the Western Province otherwise then in the cause of stealing dishonestly received or retained 2 blankets, 2 mattresses, one jerican, 2 buckets, cutlery spoons (red) one bowl, 4 tea cups, one hot pot and ¼ sack of maize knowing or having reason to believe them to be stolen goods.”***

Aggrieved by the conviction and sentence, the appellant appealed and proffered six grounds of appeal in which he attacked the evidence adduced in support of the charge, and contented that he was denied an opportunity to cross-examine the Investigating Officer as he was not called to testify, and that the goods were not found in his possession.

When the appeal came up for hearing, the appellant submitted that he had leased the premises where the goods were found but denied being in possession of the same.

Mr. Karuri, the learned State Counsel, opposed the appeal and submitted that the Appellant was rightly convicted as the offence of handling stolen goods contrary to section 322(2) of the Penal Code was proved beyond any reasonable doubt.

This being a first appeal, the appellant is entitled to a fresh reconsideration of the case against him. I am mindful that I ought to carefully examine the evidence adduced in the trial court and make my own deductions, inferences and conclusions but always remembering that the Trial Magistrate before whom the witnesses gave their testimony had vantage position.

The evidence adduced in the trial court shows that at the end of September 2004, the appellant leased the

house of PW4, John Anyande Masinde, and that he moved in on 3/10/04 when he brought various goods into the house. It was also on that date (3/10/04) that the area Assistant Chief, Aggrey Maina Makokha, (PW4) received a report that there were stolen goods in the room rented by the Appellant. PW4 went to the premises in company of the police and the goods allegedly stolen were found in his room. PW5 said that the appellant told him and the police that he got the goods from Shirembe village in Shirembe Sub-location. The goods were produced in court as exhibits Nos. 1 to 7.

The Complainant, Benetina Chivole Okoti (PW1) had had her house broken into on the night of 24th September 2004 and her household properties stolen. When she reported the burglary and theft on 4/10/04 to the area Assistant Chief and the police, the Assistant Chief (PW4) informed her that stolen property had been recovered in the appellant's house. She inspected them at the police station where they had been moved and confirmed that they were her property which had been stolen from her house when it was burgled on the night of 24<sup>th</sup> September 2004.

The Appellant was in the house where the stolen goods were when the police (PW3) and the Assistant Chief pounced on him. He opened the door. He could not offer an explanation as to how he had come by the goods.

In his evidence, the appellant alleged that the Assistant Chief had planted the offence on him. The trial court rejected his defence.

I have carefully examined the evidence. There was no question that the goods were stolen from PW1. They were found in the house of the appellant barely a week later. The appellant could not explain as to how he had come by the goods. As there was no evidence of theft, the doctrine of recent possession applied. The trial Magistrate rightly rejected the defence of the appellant and convicted the appellant of the offence of handling stolen goods contrary to section 322(2) of the Penal Code.

The appeal has no merit. It is dismissed. The conviction is upheld. However, as regards sentence, hard labour is not appropriate. The sentence is varied by setting aside hard labour but otherwise sustaining the term of imprisonment of 5 years. The Appellant shall serve that term.

*Dated, signed and delivered at Kakamega this 16<sup>th</sup> day of March, 2006.*

**G. B. M. KARIUKI**

**J U D G E**